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Filing date: **02/21/2012**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91199017
Party	Defendant Jennifer Cress
Correspondence Address	Kyle T. Peterson Patterson Thuente Christensen Pedersen, 4800 IDS CENTER 80th South 8th Street Minneapolis, MN 55402 UNITED STATES trademark@ptslaw.com
Submission	Motion to Dismiss 2.132
Filer's Name	Kyle T. Peterson
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Date	02/21/2012
Attachments	Motion to Dismiss CREEM.pdf (6 pages)(159618 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Application Serial No. 85066550
For the mark: CREEM
Filed: June 18, 2010
Published: November 16, 2010

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CREEM Enterprises, Inc.,	:	
Opposer,	:	Opposition No. 91199017
	:	
v.	:	
	:	
Jennifer Cress,	:	
Applicant.	:	
-----	X	

Honorable Commissioner for Trademarks
United States Patent and Trademark Office
P.O. Box 1451
Alexandria, VA 22313-1451

**APPLICANT'S MOTION TO DISMISS FOR OPPOSER'S FAILURE TO TAKE
TESTIMONY AND ESTABLISH A PRIMA FACIE CASE**

Applicant, Jennifer Cress, moves for judgments under Trademark Rule 2,132(a) or (b) for Opposer's failure to establish a prima facie case.

Applicant seeks to register the mark CREEM for "providing on-line magazines in the field of fashion, culture and design." Opposer opposed the application based on alleged common law rights in the trademark CREEM for, "providing on-line magazines in the field of music, lifestyle, and music culture." Opposer did not assert ownership of any Federal registrations.

Opposer offered no testimony during its testimony period, nor evidence of its alleged common law rights, or use of its alleged mark. Because no evidence was introduced in the proceeding, and no testimony was taken by Opposer, the proceeding should be dismissed under

Trademark Rule 2.132(a). In the alternative, the proceeding should be dismissed under Trademark Rule 2.132(b).

I. Absent Any Evidence or Testimony, the Notice of Opposition Should Be Dismissed Under Trademark Rule of Practice § 2.132(a).

A proceeding should be dismissed under Trademark Rule § 2.132(a) where Opposer's time for taking testimony has expired and the Opposer has not taken any testimony or offered any evidence. *Procyon Pharmaceuticals, Inc. v. Procyon Biopharma Inc.*, 61 U.S.P.Q.2d 1542, 1544 (T.T.A.B. 2001); *Hewlett-Packard Co. v. Olympus Corp.*, 931 F.2d 1551, 18 U.S.P.Q.2d 1710 (T.T.A.B. 1991).

In *Procyon*, the cancellation petitioner took no discovery or testimony during the testimony period and waited until nearly the end of the testimony period to request an extension of time for testimony. *Id.* At 1543-44. The Board held that the failure to take testimony or offer evidence warranted dismissal of the case under Trademark Rule §2.132(a). *Id.* At 1544. The facts of *Pyocyon* are similar to the facts of the instant proceeding. In this proceeding, Opposer has not taken any discovery nor taken testimony during the testimony period and, as set-forth above, has not properly introduced any evidence during its testimony period.

Because Opposer allowed the testimony period to expire without taking testimony and introduced no evidence, the Board should dismiss the opposition under Rule 2.132(a).

II. Dismissal Under Trademark Rule of Practice §2.132(b).

In the alternative, the Board should dismiss the opposition under Trademark Rule §2.132(b). Rule 2.132(b) provides that where no evidence other than a copy or copies of PTO records is offered by a party, the defendant may move for dismissal on the "ground that upon the law and the facts the party in the position of plaintiff has shown no right to relief." Trademark

Rule of Practice §2.132(b). The purpose of this motion “is to save the defendant the expense and delay of continuing with the trial in those cases where plaintiff, during its testimony period, has offered no evidence other than copies of USPTO records, and those records do not make out a prima facie case.” TBMP §534.03; *see also Litton Bus. Sys. Inc. v. J.G. Furniture Co.*, 190 U.S.P.Q. 431 (T.T.A.B. 1976) (also noting that the “avoidance of unnecessary expense and delay is not only consistent with Rule I, FRCP but is mandated thereby”).

Opposer has not claimed any registrations. However, Opposer has claimed common law rights for the mark CREEM for providing on-line magazines in the field of music, lifestyle, and music culture. As a matter of law, the common use of the common name CREEM on these good is not likely to cause confusion. *Shen Mfg. Co. v. Ritz Hotel Ltd.* 393 F.3d 1238, 73 U.S.P.Q.2d 1350 (Fed. Cir. 2004) (no likelihood of confusion between RITZ cooking classes and RITZ kitchen textiles because the goods and services were not related); *Local Trademarks, Inc. v. Handy Boys Inc.*, 16 U.S.P.Q.2d 1156 (T.T.A.B. 1990) (finding LITTLE PLUMBER for liquid drain opener not confusingly similar to the same mark for advertising services in the plumbing field because the goods and services were unrelated); TMEP §1207.01(a)(i) (explaining that confusion is not likely where the goods in question are not related even if the marks are identical).

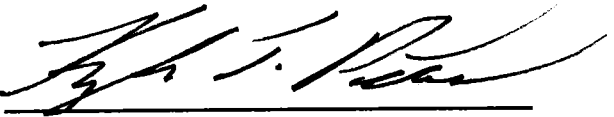
For this reason, Opposer has not established a *prima facie* case and the opposition should be dismissed under §2.132(b). *Syntex (U.S.A.) Inc. v. E.R. Squibb & Sons Inc.*, 14 U.S.P.Q.2d 1879 (T.T.A.B. 1990).

III. Conclusion

In view of the foregoing, Applicant respectfully requests that the opposition proceeding be dismissed under Trademark Rule §2.132(a) or 2.132(b).

Respectfully submitted,

PATTERSON THUENTE
CHRISTENSEN PEDERSEN, P.A.

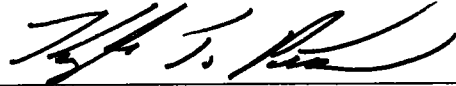
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Attorneys for Applicant Jennifer Cress

CERTIFICATE OF TRANSMITTAL

I hereby certify that a true copy of the foregoing APPLICANT'S MOTION TO DISMISS
FOR OPPOSER'S FAILURE TO TAKE TESTIMONY AND ESTABLISH A PRIMA FACIE
CASE is being filed electronically with the TTAB via ESTTA on this day, February 21, 2012.

A handwritten signature in black ink, appearing to be 'J. H. [unclear]', written over a horizontal line.

Attorney for Applicant Jennifer Cress

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v.	:	
	:	
Jennifer Cress,	:	
Applicant.	:	
-----X	:	

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing APPLICANT'S MOTION TO DISMISS
FOR OPPOSER'S FAILURE TO TAKE TESTIMONY AND ESTABLISH A PRIMA FACIE
CASE has been served on Opposer by depositing said copy with the United States Postal Service
as First Class Mail, postage prepaid, in an envelope addressed to:

Jason Turner
CREEM Enterprises, Inc.
936 Southwood Blvd. Suite 201
Incline Village, NV 89451

Dated: February 21, 2012



Attorney for Applicant Jennifer Cress